



Recent Developments in Campaign Finance Law

August 26, 2015

1:15 – 2:45 p.m.

Objectives



- ▣ Highlight Recent Litigation, Policy and Legislative Developments
 - Contributions
 - Reporting
 - Corporate/Labor Activity
 - Independent Spending
 - Technology-Related Developments
 - PACs/PAC Status
 - Personal Use of Campaign Funds
 - Public Funding



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UPDATES ON CONTRIBUTIONS (SOURCES, LIMITS AND PROHIBITIONS)

Contributions: Public Funding

Gabriella Miller Kids First Research Act of 2014

- ▣ Terminated public funding for Presidential nominating conventions:
 - Directed U.S. Treasury to transfer former convention funds to a 10-Year Pediatric Research Initiative Fund
 - President signed Act into law on April 3, 2014
 - In 2014, Treasury transferred \$37.8 million



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I. Contributions – Political Party Accounts (including Public Funding of Presidential Elections, National Political Party Committee Accounts, Party Committee Independent Expenditure Accounts, and Federal Election Activity by State and Local Committees)

A. Legislative Update

1. *Gabriella Miller Kids First Research Act, Public Law 113-94, 128 Stat. 1085 (2014)*

- a. This Act terminated public funding for Presidential nominating conventions.
- b. This Act also directed the U.S. Treasury to transfer the funds formerly known as convention funds to a fund known as the 10-Year Pediatric Research Initiative Fund.
- c. Introduced by Rep. Gregg Harper (MS-3), with a bipartisan group of 152 co-sponsors, H.R. 2019 passed the House of Representatives by a vote of 295 to 103, and passed the Senate by unanimous consent. The President signed it into law on April 3, 2014.
- d. In 2014, U.S. Treasury transferred \$37.8 million to the Fund, of which \$12.6 million has been appropriated for use by the National Institutes of Health.

Contributions: National Party Accounts

- ▣ AO 2014-12 (DNC and RNC)
 - National parties asked if they could raise funds under separate contribution limit to finance 2016 presidential nomination conventions
 - AO allows national party committees to establish convention committee to raise funds under separate limit



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B. Policy Update

1. AO 2014-12 (Democratic National Committee (DNC) and Republican National Committee (RNC))

- a. In August 2014, the DNC and the RNC jointly asked if they can raise funds under a separate contribution limit to finance expenses for their 2016 presidential nominating conventions.
- b. This AO concluded that they may establish convention committees to raise funds under a separate limit.

Contributions: National Party Accounts

Consolidated and Further Appropriations Act of 2015

- ▣ Provisions of “cromnibus” permit national party committees to establish new accounts for:
 - Presidential nominating conventions
 - Election recounts and other legal expenses
 - Party headquarters buildings
- ▣ Contribution limit = 300% limit to national party
 - \$45,000/yr – multicandidate committees
 - \$100,200/yr – all other contributors (2015-16)



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C. Legislative Update

1. ***Consolidated and Further Continuing Appropriations Act, 2015, Div. N, § 101, Public Law 113-235, 128 Stat. 2130, 2772-73 (2014).***
 - a. One provision of the “cromnibus” provides that national party committees may establish accounts to defray certain expenses incurred with respect to:
 - (1) presidential nominating conventions;
 - (2) election recounts and other legal proceedings; and
 - (3) headquarters buildings.
 - b. The contribution limits applicable to these accounts are 300% of the limit on contributions to national party committees, which means that the accounts may accept up to \$45,000 per year from multicandidate committees and \$100,200 per year from all other contributors during the 2015-2016 election cycle.
 - c. Descriptions of these provisions appear in the *Congressional Record*: 160 Cong. Rec. H9286 (daily ed. Dec. 11, 2014) (statement of Rep. Boehner) and 160 Cong. Rec. S6814 (daily ed. Dec. 13, 2014) (statement of Sen. Reid).
 - d. Relevant articles:
 - *National Parties May Establish New Accounts*, **FEC Record** (Dec. 22, 2014)
 - *Contribution Limits for 2015-2016*, **FEC Record** (Feb. 3, 2015)
 - *FEC Issues Interim Guidance for National Party Accounts*, **FEC Record** (Feb. 18, 2015)

D. Policy Update

1. Future Rulemaking Possible

Commission is assessing the impact of the Consolidated and Further Continuing Appropriations Act on existing regulations.

Contributions: Party IE Accounts

Rufer v. FEC / RNC v. FEC

- ▣ Plaintiff political parties sought to accept contributions of unlimited amounts into bank accounts used for independent expenditures
- ▣ District court found not frivolous, but not likely to succeed
- ▣ Stipulated dismissals at Court of Appeals



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E. Litigation Update

**1. *Rufer v. FEC / Republican National Committee (RNC) v. FEC*,
64 F. Supp. 2d 195 (D.D.C. Aug. 19, 2014)**

- a. Committees of the Libertarian and Republican parties and persons associated with those parties challenged limits on contributions to the parties as applied to accounts they proposed to use solely for expenditures that are not coordinated with candidates. The court denied the *Rufer*/Libertarian Party plaintiffs' motion for a preliminary injunction, finding them unlikely to succeed given past Supreme Court cases upholding limits on contributions to political parties.
- b. The court also considered requests by plaintiffs to proceed pursuant to two special judicial review provisions and found the case inappropriate for one provision that provides for a direct appeal to the Supreme Court. The court found the case appropriate for another special procedure, concluding that the challenges presented substantial, nonfrivolous questions that were sent to the en banc Court of Appeals.
- c. Plaintiffs in both cases ultimately chose to dismiss their cases.

Contributions: Federal Election Activity



Republican Party of Louisiana v. FEC

- ▣ Plaintiffs challenge requirements that state and local parties pay for FEA with funds permitted under federal contribution restrictions or through an allocated mix of federal and “Levin funds,” and report the activity
- ▣ Plaintiffs contend the First Amendment requires that they be permitted to fund their planned get-out-the-vote, voter registration, and other activity through an allocated mix of federal funds and funds raised under Louisiana law



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2. *Republican Party of Louisiana v. FEC*, No. 15-cv-1241 (D.D.C. filed Aug. 3, 2015)

- a. The Republican Party of Louisiana, the Jefferson Parish Republican Parish Executive Committee, and the Orleans Parish Republican Executive Committee challenge the requirement that state and local political parties pay for “federal election activity” with funds compliant with federal source and amount restrictions or, for certain activity, through an allocated mix of federal and “Levin funds.” 52 U.S.C. § 30125(b)(1), (c). “Federal election activity” includes certain get-out-the-vote activity, voter identification efforts, generic campaign activity promoting a political party, and voter registration conducted within a specified time prior to a federal election. (“Levin funds” are funds permissible under state law and subject to several other restrictions, but not all of the restrictions of federal law.) Plaintiffs also challenge the requirement that “federal election activity” be reported to the FEC. 52 U.S.C. § 30104(e)(2).
- b. Plaintiffs contend that the First Amendment requires that they be permitted to fund the activity through an allocated mix of federal funds and funds raised under Louisiana law (including a contribution limit on individuals of \$100,000 per four years).
- c. In addition to their claims to have the statute struck down facially, plaintiffs also bring in the alternative three narrower claims seeking to have the provisions declared unconstitutional as applied in certain specific circumstances.

Contributions: Party Coordinated Expenditures

S. 1910, Financial Services and General Government Appropriations Act of 2016

Sen. John Boozman (AR)

- ▣ Applies party coordinated expenditure limits to public communications only when controlled by, or made at discretion of, candidate or authorized committee
- ▣ Makes FEC point of entry for all designations, statements and reports and subjects all committees to mandatory electronic filing once financial activity >\$50,000/yr



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F. Legislative Update

1. *S. 1910, Financial Services and General Government Appropriations Act of 2016, Sen. John Boozman (AR)*

- a. Senate Appropriations Committee reported the Financial Services and General Government Appropriations Act, 2016, on July 23, 2015.
- b. The bill would narrow the party coordinated expenditures limits (formerly known as § 441a(d) limits) to apply to public communications *only* when the communications is controlled by, or made at the direction of, the candidate or authorized committee.
- c. The bill would also amend FECA to require all designations, statements and reports filed under FECA to be filed with the FEC. Current law provides that Senate candidate committees, the National Republican Senatorial Committee and the Democratic Senatorial Campaign Committee must file with the Secretary of the Senate. This amendment would make all committees subject to mandatory electronic filing once financial activity exceeds (or is expected to exceed) \$50,000 per year.

Contributions: Biennial Aggregate Limits

McCutcheon v. FEC

- ▣ Supreme Court strikes down biennial aggregate limits on overall individual contributions to:
 - Candidates;
 - Party Committees; and
 - PACs
- ▣ Limits violate First Amendment



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II. Contributions: Biennial Aggregate Limits

A. Litigation Update

1. *McCutcheon v. FEC*, 134 S. Ct. 1434 (Apr. 2, 2014).

- a. Plaintiffs Shaun McCutcheon and the Republican National Committee challenged the biennial aggregate contribution limits that at the time were codified at 2 U.S.C. § 441a(a)(3) and limited individuals to giving \$48,600 to candidates and \$74,600 to non-candidate committees, on First Amendment grounds.
- b. On April 2, 2014, the Supreme Court concluded that the aggregate limits are unconstitutional. The aggregate limits prohibit an individual from fully contributing to all the candidates of a contributor's choosing, and the Court noted that there were impediments to individuals being able to find other ways of expressing support for a number of candidates.
- c. Aggregate limits do not meaningfully prevent actual or apparent quid pro quo corruption, the court's opinion concluded, because an individual could not make many contributions to other entities in order to have those funds routed to a particular candidate of their choosing. The court found that other rules and practical concerns would prevent that from happening.
- d. Regarding concerns about the potential for officeholders to solicit and receive large contributions for a number of candidates and committees at once, the Court concluded the aggregate limits restricted more First Amendment activity than necessary to serve that purpose.

Contributions: Biennial Aggregate Limits

Commission Rulemaking

- ▣ Commission amends regulations to conform to *McCutcheon* decision
- ▣ Commission asks for public comment on whether to revise other regulations in light of *McCutcheon*
- ▣ Public hearing held on February 11, 2015
- ▣ On May 21, 2015, the Commission voted 3-3 on a motion to open a rulemaking in this matter



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B. Policy Update

1. **Removal of Aggregate Biennial Contribution Limits (*McCutcheon*), 79 Fed. Reg. 77373 (Dec. 24, 2014) (Final Rule)**

- a. To conform its regulations to the *McCutcheon* decision, the Commission deleted 11 CFR 110.5, which implemented the FECA's aggregate contribution limits.
- b. The Final Rule also made technical and conforming changes to several other regulations.

2. **Earmarking, Affiliation, Joint Fundraising, Disclosure, and Other Issues (*McCutcheon*), 79 Fed. Reg. 62361 (Oct. 17, 2014) (Advance Notice of Proposed Rulemaking)**

- a. The Commission asked for public comment on whether to begin a rulemaking to revise other regulations following the *McCutcheon* decision.
- b. Specifically, the Commission asked whether to revise its regulations regarding earmarking, affiliation, joint fundraising committees, and disclosure.
- c. The Commission received more than 32,000 comments and held a day-long public hearing on February 11, 2015.
- d. Comments received are available at <http://sers.fec.gov/fosers/viewreg.htm?regno=2014-01>
- e. On May 21, 2015, the Commission voted 3-3 on a motion to open a rulemaking in this matter.

Contributions: Per Election Limits

Holmes v. FEC

- ▣ Challenge to contributions limits applied on a per election basis
- ▣ Court held that limits did not violate the First Amendment or plaintiffs' right to equal protection



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III. Contributions: Per Election Limit

A. Litigation Update

1. ***Holmes v. FEC*, __ F. Supp. 3d __, 2015 WL 1778778 (D.D.C. Apr. 20, 2015)**
 - a. Two contributors to candidates contend that the then-\$2,600, per-election contribution limit in federal law violated their First and equal protection rights by preventing them from donating \$5,200 to candidates after primary elections for use only in connection with general-election campaigns.
 - b. On April 20, 2015, the U.S. District Court for the District of Columbia awarded judgment to the Commission. The court found that plaintiffs' ostensible First Amendment challenge to the temporal operation of FECA's limits was essentially a challenge to the amount of the contribution limit set by Congress and upheld by the Supreme Court as a means to combat corruption. The court concluded that the source of plaintiffs' complaints about candidates unopposed in primaries using leftover primary-election funds in general elections was an FEC regulation, 11 CFR 110.3(c)(3), which plaintiffs had not challenged.

- c. The court also rejected plaintiffs' contention that the per election limits violated their Equal Protection rights under the Fifth Amendment. Federal law treats contributors to candidates who ran in uncontested primaries the same as it treats other contributors, the Court found, and Congress did not invidiously discriminate against any classes of contributors.
- d. Finally, the court found the case insubstantial, governed by settled law, and thus inappropriate for a special FECA judicial review provision. (The district court had previously sent constitutional questions to the D.C. Circuit Court of Appeals en banc pursuant to that procedure, but that court had then returned the case to the district court for record development and substantiality screening.)
- e. Plaintiffs appealed the decision on April 24, 2015.

Contributions: Contractors

Wagner v. FEC

- ▣ D.C. Circuit Court rejected challenges to prohibition on contributions by individual federal government contractors under:
 - First Amendment
 - Equal Protection



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IV. Contributions: Federal Government Contractors

A. Litigation Update

1. ***Wagner v. FEC*, _ F.3d _, 2015 WL 4079575 (D.C. Cir. July 7, 2015).**
 - a. This case is a constitutional challenge under the First Amendment and equal protection component of the Fifth Amendment to the prohibition on contributions by federal government contractors, 52 U.S.C. § 30119 as applied to individual contractors.

- b. Pursuant to a FECA special judicial review provision, the constitutional issues were considered by all active judges of the United States Court of Appeals for the District of Columbia Circuit (an *en banc* sitting). In July 2015, the court upheld the statute. The court rejected plaintiffs' request that their claims be subject to strict scrutiny, and instead applied the "closely drawn" scrutiny ordinarily applicable to contribution limits.
- c. The court found there are important government interests in combatting quid pro quo corruption and its appearance and in merit-based public administration, and that the contractor prohibition furthers those purposes.
- d. The ban on contributions is "closely drawn to avoid unnecessary abridgment of associational freedoms," the court found, given the heightened risk of quid pro quo corruption and interference with merit-based public administration associated with government contracts.
- e. The statute was also not unconstitutionally underinclusive, the court concluded, even though it does not reach certain entities and individuals associated with firms that have government contracts, federal employees, and recipients of other government benefits such as grants. Plaintiffs failed to establish that the contractor provision was not serving the government's cited purposes and was instead serving an impermissible one, such as disfavoring a particular speaker or viewpoint.
- f. The court rejected plaintiffs' equal protection claims for the same reasons it concluded the provision was not unconstitutionally underinclusive.

Contributions: Contractors

Notice of Availability

- ▣ FEC Regulations, 11 CFR Part 115
 - Prohibition on “knowingly soliciting” a federal contractor
- ▣ Petition for Rulemaking
 - Include list of factors to determine when entities of same corporate family are distinct businesses



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B. Policy Update

1. Amendment of 11 C.F.R 115, 80 Fed. Reg. 16595 (March 30, 2015) (Notice of Availability)

- a. Petition for Rulemaking from Public Citizen received Nov. 18, 2014.
 - (1) 11 CFR Part 115 prohibits federal contractors from making contributions or expenditures to any political party, political committee, or federal candidate, or to any person for any political purpose or use. 11 CFR 115.2(a)
 - (2) Regulations also prohibit any person from knowingly soliciting a contribution from any federal contractor. 11 CFR 115.2(c)
 - (3) MUR 6726 (Chevron Corporation): complaint involving corporate contractor parent and corporate non-contractor subsidiary
 - (4) Petition asks Commission to promulgate specific factors for determining whether entities of the same corporate family are distinct business entities for purposes of these prohibitions.
- b. Comment period closed May 29, 2015
- c. Comments received are available at:
<http://sers.fec.gov/fosers/viewreg.htm?regno=2014-09>

Contributions: Hybrid SSFs

Stop This Insanity, Inc. Employee Leadership Fund, et al v. FEC

▣ DC Circuit Court:

- The First Amendment does not require that SSFs be permitted to set up an independent expenditure account without contribution or solicitation restrictions



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V. Contributions: Hybrid SSFs

A. Litigation Update

1. *Stop This Insanity, Inc. Employee Leadership Fund v. FEC*, 761 F.3d 10 (D.C. Cir. Aug. 5, 2014), cert. denied 83 U.S.L.W. 3242 (U.S. Jan. 12, 2015) (No. 14-391).

- a. The separate segregated fund (“SSF”) of Stop This Insanity, Inc., a corporation, sought to establish a non-contribution account and to solicit unlimited contributions from members of its restricted class, as well as other persons, in order to fund independent expenditures.
- b. Stop This Insanity, its SSF the Leadership Fund, and a group of potential contributors challenge the application of contribution and solicitation restrictions to their proposed non-contribution account of an SSF as an unconstitutional limit on their First Amendment rights of freedom of speech and association.
- c. The Court of Appeals for the D.C. Circuit rejected the plaintiffs’ First Amendment challenge. The Court noted that there are solicitation restrictions on corporate PACs, and that corporations are permitted to fund the establishment, administration, and solicitation costs of their PACs without disclosure. The court also noted that PACs are no longer necessary for corporate involvement in independent expenditures; following *Citizens United*, corporations are permitted to make such expenditures with their general treasury funds.

- d. By seeking to finance independent expenditures through its separate segregated fund rather than directly with corporate funds, the court concluded that Stop This Insanity, Inc. was voluntarily choosing a more burdensome alternative. Because of the substantial overlap between the political speech of Stop This Insanity, Inc. and its separate segregated fund, the court held there was no substantial burden on the entities' First Amendment rights.
- e. In the alternative, even assuming a separate segregated fund's First Amendment rights should be viewed in isolation from its sponsoring organization, the Court found that disclosure requirements for solicitations furthered the governmental interest in preventing quid pro quo corruption.
- f. On January 12, 2015, the Supreme Court denied the plaintiffs' petition for certiorari.

Contributions: Multicandidate Status

Stop Reckless Economic Instability caused by Democrats PAC v. FEC

- ▣ District Court rejected First and Fifth Amendment challenges to:
 - Six-month waiting period for multicandidate status
 - Limits on contributions from multicandidate PACs to federal party committees



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VI. Contributions: Multicandidate Status

A. Litigation Update

- 1. *Stop Reckless Economic Instability caused by Democrats PAC, et al. v. FEC*, _ F. Supp. 3d _, 2015 WL 867091 (E.D. Va. Feb 27, 2015).

- a. Stop Reckless Economic Instability caused by Democrats PAC, Tea Party Leadership Fund, the Alexandria Republican City Committee, and American Future PAC claim that the limits infringe upon their First Amendment rights of association and expression and the Fifth Amendment's guarantee of equal protection.

- b. They seek to have:
- (1) the six-month waiting period for multicandidate PAC status struck down, so that the limit on contributions from Stop PAC to candidates would be raised from \$2,600 per election (and indexed for inflation) to \$5,000 per election;
 - (2) the limit on contributions from multicandidate PACs to state party committees raised from \$5,000 per calendar year to \$10,000 per calendar; and
 - (3) the limit on contributions from multicandidate PACs to national party committees raised from \$15,000 per calendar year to \$32,400 per calendar year.
- c. In each case, they seek whichever contribution limit is higher between 52 U.S.C. § 30116(a)(2) (the statutory limits for multicandidate candidate committees; now at) and 52 U.S.C. § 30116(a)(2) (the statutory limits for other persons).
- d. On February 27, 2015, the district court rejected plaintiffs' First Amendment challenge because contribution limits do not directly restrain speech and the new PAC in the case was free to engage in independent expression and organize volunteer efforts in support of candidates. The court also rejected plaintiffs' equal protection challenge, finding that new PACs pose a greater danger of circumvention of contribution limits and are not similarly situated to older PACs.
- e. Plaintiffs appealed the decision on April 22, 2015.

Contributions: Multicandidate Status

For 2015-16 Elections	Candidate Committee per election	PAC (SSF and Nonconnected) per year	State, District & Local Party Committee per year	National Party Committee per year	Additional National Party Committee Accounts per year
Individual	\$2,700	\$5,000	\$10,000 (combined)	\$33,400	\$100,200
Candidate Committee	\$2,000	\$5,000	Unlimited Transfers	Unlimited Transfers	
PAC: multicandidate	\$5,000	\$5,000	\$5,000 (combined)	\$15,000	\$45,000 (per account)
PAC: Nonmulticandidate	\$2,700	\$5,000	\$10,000 (combined)	\$33,400	\$100,200 (per account)
National Party Committee	\$5,000	\$5,000	Unlimited Transfers	Unlimited Transfers	
State, District & Local Party Committee	\$5,000 (combined)	\$5,000 (combined)	Unlimited Transfers	Unlimited Transfers	



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Contributions: Bequests

- ▣ AOR 2015-05 (Shaber)
 - Decedent's trust grants \$191K contribution to LNC
 - Trustee asks whether trust can disburse full amount to independent escrow agent for future distributions to LNC in accordance with annual contribution limits



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VII. Contributions: Bequests

A. Policy Update

1. Advisory Opinion Request (AOR) 2015-05 (Shaber)

- a. Trust bequeathed funds to LNC at settlor's death; after an initial disbursement, the remaining funds approximately \$191,000.
- b. Trustee ("requestor") stated that to distribute the remaining funds to the LNC in accordance with annual contribution limits would take 6 years. Trustee did not want to bear administrative burden and costs associated with keeping trust open for this period.
- c. Requestor proposed distributing remaining funds to independent third-party escrow agent to distribute annually to LNC the maximum amount permissible under Act and Commission regulations
- d. Requestor stated that LNC would not have control over the escrow agent or over the undisbursed funds.

Contributions: Foreign Nationals

- ▣ AO 2014-20 (Make Your Laws PAC)
 - Application of “volunteer services exception” to services provided by foreign nationals

VIII. Contributions: Foreign Nationals

A. Policy Update

1. Advisory Opinion 2014-20 (Make Your Laws PAC)

- a. Nonconnected political committee (“requestor”) jointly owned rights to certain intellectual property relating to the requestor’s website and brand. All services in creating the intellectual property were provided by unpaid volunteers who were U.S. citizens. Volunteers signed agreements transferring all rights and ownership in the intellectual property to the requestor.
- b. Commission determined that the requestor can accept the same kind of unpaid services from foreign nationals under the volunteer services exemption from the definition of “contribution”.

UPDATES ON REPORTING AND DISCLOSURE

Reporting: Electioneering Communications

Van Hollen v. FEC

- ▣ Challenge to rules on:
 - Disclosure of contributors to corporations and unions making electioneering communications
- ▣ Alleges:
 - Regulation requires too little disclosure
 - Only persons giving “for the purpose of furthering electioneering communications” must be disclosed
- ▣ District court struck the regulation down



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I. Reporting: Electioneering Communications

A. Litigation Update

1. *Van Hollen v. FEC*, __ F. Supp. 3d __, 2014 WL 6657240 (D.D.C. Nov. 25, 2014), *appeal docketed*, Nos. 15-5016, 15-5017 (D.C. Cir.).
 - a. Challenge to FEC regulations on the disclosure of donations given to fund electioneering communications.
 - b. Representative Van Hollen claims that 11 CFR 104.20(c)(9) is contrary to FECA. The regulation requires the disclosure of any donation of \$1,000 or more to corporations (including nonprofits) or labor organizations when the donation “was made for the purpose of furthering electioneering communications.”
 - c. Van Hollen argues that FECA requires corporations and unions to disclose all donations they receive of \$1,000 or more unless the donations for electioneering communications have been segregated in a separate bank account.
 - d. The district court initially found that FECA clearly requires every person who funds electioneering communications to disclose all contributors, but the U.S. Court of Appeals for the District of Columbia Circuit reversed and found that the Act’s disclosure requirement is

ambiguous and the Commission had some room for interpretation. The matter returned to the district court for a determination of whether the FEC had reasonably exercised its discretion.

- e. On November 25, 2014, the district court found the Commission's rationale for the regulation unreasonable and unsupported by the evidence in the rulemaking record, and also found that the regulation frustrated the statute's disclosure objective. The court vacated the regulation.
- f. Intervenor-defendants Center for Individual Freedom and Hispanic Leadership Fund have appealed the decision and oral argument is scheduled for October 20, 2015.

Reporting: Electioneering Communications

H.R. 430, DISCLOSE 2015 Act

Rep. Chris Van Hollen (MD-8)

- ☐ Enhanced Disclosure
- ☐ Extends "Stand by Your Ad"
- ☐ Revises IE and EC Definitions
- ☐ Requires Corporate Disclosure of Shareholders
- ☐ Expands Lobbyist Disclosure of Campaign Expenditures

S. 229, DISCLOSE 2015 Act

Sen. Sheldon Whitehouse (RI)

- ☐ Similar to H.R. 430 with a few exceptions



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B. Legislative Update

1. **H.R. 430, *Disclosure of Information on Spending on Campaigns Leads to Open and Secure Elections Act of 2015 (DISCLOSE 2015 Act)*, Rep. Chris Van Hollen (MD-8)**

- a. Introduced January 21, 2015.
- b. Provides for additional disclosure requirements for corporations, labor organizations, Super PACs, 501(c) and 527 organizations.
- c. Specifically, covered organizations would be required to disclose campaign-related disbursements, which would include electioneering communications, independent expenditures and related transfers.

- d. Additionally, the bill would:
 - (1) Extend the definition of “independent expenditure” to functional equivalent of express advocacy;
 - (2) Expand the electioneering communications time period;
 - (3) Extend “stand by your ad” disclaimer requirements to include top five funders;
 - (4) Require corporate disclosure to shareholders; and
 - (5) Expand lobbyist disclosure of campaign expenditures under Lobbying Disclosure Act of 1995.
- e. *Referred to the Committees on House Administration, Judiciary and Ways & Means.*
- f. *History:*
 - *113th Congress (2013-14): H.R. 148, S. 2516*
 - *112th Congress (2011-12): H.R. 4010, S. 2219 and S. 3369*
 - *111th Congress (2009-10): H.R. 5175, S. 3295 and S. 3628. H.R. 5175 was subject of H.R. Rept. 111-492 (May 25, 2010) and passed the House of Representatives by 219-206 on June 24, 2010.*

2. S. 229, *Democracy Is Strengthened by Casting Light On Spending in Elections Act of 2015 (DISCLOSE 2015 Act)*, Sen. Sheldon Whitehouse (RI)

- a. Introduced on January 21, 2015.
- b. The Senate version of the DISCLOSE 2015 Act is similar to the House bill, H.R. 430, with a few exceptions.
 - (1) S. 229 would not extend “stand by your ad” disclaimer requirements.
 - (2) S. 229 would not require additional corporate disclosure to shareholders.
 - (3) S. 229 would not expand lobbyist disclosure under Lobbying Disclosure Act of 1995.
- c. *Referred to the Committee on Rules & Administration.*

Reporting: Electioneering Communications

Independence Institute v. FEC

- ▣ Challenge to rules as applied to communications that do not attack or oppose the referenced federal candidates
- ▣ Disclosure requirements valid in that context



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C. Litigation Update

1. ***Independence Institute v. FEC*, 70 F. Supp. 3d 502 (D.D.C. Oct. 6, 2014), appeal docketed, No. 14-5249 (D.C. Cir.)**
 - a. The Independence Institute, a nonprofit organization, challenged the application of federal disclosure requirements for “electioneering communications” to a radio advertisement it planned to air that it contended was a “genuine issue ad” which did not attack the referenced federal candidate.
 - b. On October 6, 2014, the U.S. District Court for the District of Columbia court awarded judgment to the Commission, finding that the Supreme Court had rejected an attempt to limit application of the disclosure requirements to express advocacy and its functional equivalent in *Citizens United*.
 - c. Independence Institute has appealed and oral argument is scheduled for October 22, 2015.

Reporting: Administrative Fines

- ▣ Legislation enacted December 26, 2013 authorizes extension and expansion
 - AFP to cover reporting periods through December 31, 2018; and
 - May cover certain reports not previously subject to administrative fines
- ▣ Commission approves rules on January 13, 2014 to extend AFP through 2018
- ▣ Expansion may be considered in separate rulemaking



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II. Reporting: Administrative Fines

A. Policy Update

1. **Extension of Administrative Fines Program (79 Fed. Reg. 3302, Jan. 21, 2014) Extends AFP to cover reporting periods through December 31, 2018.**
 - a. Implements Public Law 113-72, 127 Stat. 1210, sec. 1 (Dec. 26, 2013), which also authorizes Commission to expand scope of AFP to cover additional categories of reporting violations.
 - b. Future rulemaking may address possible expansion.

Reporting: Administrative Fines

- ▣ Expansion may include:
 - IE reports filed by individuals and others (Form 5)
 - Certain FEA reports filed by parties (Form 3X)
 - Electioneering Communication reports (Form 9)
 - 24- and 48-Hour IE reports filed by political committees (Schedule E) and by individuals and others (Form 5)
 - Lobbyist bundling reports (Form 3L)
 - Convention reports filed by convention/host committees



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Reporting: Administrative Fines

Notice of Availability

- ▣ Expand AFP program
- ▣ Revise forms and instructions
 - Streamline Form 3X
 - Super PACs
 - Hybrid PACs
 - Corporate/labor contributions to Super PACs
 - Separate form for political party committees



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2015-16 Election Cycle

Recent Developments in the Law



2. **Administrative Fines and Forms, 80 Fed. Reg. 16594 (March 30, 2015) (Notice of Availability)**
 - a. Petition for Rulemaking received January 23, 2015. Asks Commission to make changes including:

- (1) Expand scope of AFP to the areas approved for expansion by Congress
 - (2) Use approach that considers the criteria in currently penalty schedule at 11 CFR 111.43 and similar factors but eschews strict formulaic penalty
 - (3) Revising forms and instructions to: 1) streamline Form 3X for reporting in-kind contributions; 2) reflect existence of Super PACs; 3) reflect existence of hybrid committees (*Carey* accounts); 4) reflect that corporations and labor organizations may make contributions to Super PACs and hybrid committees; 5) create separate reporting form for political party committees
- b. Comment deadline was May 29, 2015.
 - c. Comments received are available at:
<http://sers.fec.gov/fosers/viewreg.htm?regno=2015-01>

Reporting: Administrative Fines

Combat Veterans PAC v. FEC

- ▣ Challenge to FEC administrative fine assessed for late filed report
- ▣ Any procedural error by Commission was harmless
- ▣ Penalties against committee and office of treasurer reasonable despite allegations of wrongdoing by former treasurer



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Recent Developments in the Law



B. Litigation Update

1. **Combat Veterans for Congress Political Action Committee, et al. v. FEC, __ F.3d __, 2015 WL 4528190 (D.C. Cir. July 28, 2015)**
 - a. Combat Veterans for Congress PAC filed three FEC reports late and the Commission assessed a total of \$8,690 in civil penalties on the committee and its treasurer in his official capacity. The committee filed a petition seeking review of the administrative fine.

- b. Plaintiffs contended that the Commission had not complied with the Federal Election Campaign Act when it used a “no-objection” voting procedure when initiating agency proceedings against the defendant despite the Act’s requirement that there be “affirmative votes.” The D.C. Circuit Court of Appeals concluded that any such error was harmless because it had not prejudiced the defendants and the Commission later found the defendants liable using marked ballots.
- c. Plaintiffs made a number of other contentions rejected by the court, including that the committee should not be held liable because its former treasurer had recklessly left his post and prevented the committee from filing timely. The court concluded that the Commission was not required to find that only the former treasurer should be held liable in his personal capacity, and that the Commission had reasonably fined both the committee and its treasurer in his official capacity.
- d. The time for plaintiffs to file a petition for certiorari has not yet lapsed.

Reporting: Contributions

Notice of Availability

- ▣ Petition for Rulemaking
 - New reporting requirements for any person “other than a natural person” who makes aggregate contributions in excess of \$1,000 per calendar year
 - Require “original source” of all contributions and expenditures
- ▣ Comment period closes October 27, 2015



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Recent Developments in the Law



III. Reporting: Contributions

A. Policy Update

1. Contributions from Corporations and Other Organizations to Political Committees, 80 Fed. Reg. 45115 (July 29, 2015) (Notice of Availability)

- a. Petition for Rulemaking received on May 14, 2015. Asks Commission to modify regulations requiring disclosure of contributions from corporations and other organizations to political committees:
 - (1) Require any person, “other than a natural person,” making contributions aggregating in excess of \$1000 in a calendar year to any political committee, whether directly or indirectly, to do so from an account subject to certain reporting requirements;
 - (2) Require disclosure of “original source of all election-related contributions and expenditures, traceable through all intermediary entities to a natural person, regardless of the amounts or entities involved.”
- b. Comment deadline is October 27, 2015

UPDATES ON CORPORATE//LABOR ACTIVITY

Corporate/Labor Activity

Citizens United Rulemaking

- ▣ Final Rule on Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations – October 21, 2014
- ▣ Final Rule amends Commission regulations in response to the *Citizens United* decision
- ▣ Effective January 27, 2015



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Recent Developments in the Law



I. Corporate/Labor Activity: *Citizens United*

A. Policy Update

1. Independent Expenditures and Electioneering Communications by Corporations and Labor Organizations, 79 Fed. Reg. 62797 (Oct. 21, 2014) (Final Rule)

- a. Removes the regulatory prohibition on the use of corporate and labor organization general treasury funds to finance independent expenditures and electioneering communications.
- b. Appends a note to 11 CFR 114.2 to recognize that corporations and labor organizations may contribute to nonconnected committees that make only independent expenditures (Super PACs), and to separate accounts maintained by nonconnected committees for making only independent expenditures (hybrid committees).
- c. Revises several other regulatory provisions in 11 CFR Part 114 concerning the making of independent expenditures and electioneering communications by corporations and labor organizations.
- d. Took effect January 27, 2015.

Corporate/Labor Activity

Providing Fringe Benefits to Employees Running for Federal Office

- ▣ AO 2014-14 (Trammell)
- ▣ AO 2014-15 (Brat)



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Recent Developments in the Law



II. Corporate/Labor Activity: Fringe Benefits

A. Policy Update

1. AO 2014-14 (Trammell) and AO 2014-15 (Brat)

- a. Two tenured professors employed by Randolph-Macon College, a Virginia registered corporation, won their respective political party nominations for the U.S. House of Representatives.
- b. The Commission concluded that the College may pay its share of certain fringe benefits during the professors' unpaid leaves of absence to run for federal office.

Corporate/Labor Activity

SSF Affiliation

- ▣ AO 2014-21 (Cambia Health Solutions)
- ▣ AO 2014-11 (Health Care Services Corporation Employees)
- ▣ AO 2014-18 (Rayonier Advanced Materials)
- ▣ AO 2014-17 (Berkadia Commercial Mortgage)



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Recent Developments in the Law



III. Corporate/Labor Activity: SSF Affiliation

A. Policy Update

1. **AO 2014-11 (Health Care Services Corporation Employees) and AO 2014-21 (Cambia Health Solutions)**
 - a. The advisory opinions considered whether the SSFs of two health insurance corporations were affiliated with the SSFs of the Blue Cross and Blue Shield Association.
 - b. The Commission concluded in both instances that SSFs were disaffiliated after a change in the business relationship between the corporations.
2. **AO 2014-18 (Rayonier Advanced Materials)**

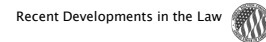
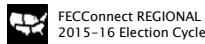
SSFs of two corporations are disaffiliated after corporate spin-off.
3. **AO 2014-17 (Berkadia Commercial Mortgage)**

An LLC wholly owned by two corporations and affiliated with each of them may authorize a trade association of which it is a member to solicit its administrative and executive personnel.

Corporate/Labor Activity

Charitable Matching

- ▣ AO 2015-02 (Grand Trunk Western Railroad)
 - SSF matches contributions to SSF with donations to charitable organization of contributor's choice
 - May include non-US charity



IV. Corporate/Labor Activity: Charitable Matching

A. Policy Update

1. AO 2015-02 (Grand Trunk Western Railroad)

Charitable matching is a permissible solicitation expense and does not constitute an exchange of corporate monies for voluntary contributions.

Corporate/Labor Activity

State Laws Regulating SSF Activities and Federal Preemption

- ▣ AO 2014-04 (Enterprise Holdings)
- ▣ AO 2014-05 (Henry Ford Health System Government Affairs Services)



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2015-16 Election Cycle

Recent Developments in the Law



V. Corporate/Labor Activity: State Laws Regulating SSF Activities and Federal Preemption

A. Policy Update

1. AO 2014-04 (Enterprise Holdings)

- a. A corporation asked whether federal law preempted New York law regarding the corporation's use of payroll deductions to process voluntary contributions to its SSF.
- b. The Commission concluded that the deductions were permissible under the Act and did not reach the preemption question because the state clarified that the state law did not apply.

2. AO 2014-05 (Henry Ford Health System Government Affairs Services)

- a. An SSF asked whether it may solicit contributions from employees of its connected organization's corporate parent and that parent's other subsidiaries, and whether the Act preempted Michigan law on this issue.
- b. The Commission concluded that the solicitations were permissible under the Act, and that the state officially interpreted the law as not regulating contributions made to support or oppose federal candidates.

UPDATES ON INDEPENDENT SPENDING

Independent Spending

Notice of Availability

- ▣ Revise existing rules/promulgate new rules on:
 - Disclosure of independent expenditures/electioneering communications
 - Election-related spending by foreign nationals
 - Solicitations of corporate/labor organization employees and members
 - Expenditures by IEOPCs and Hybrid PACs
- ▣ Comment period closes on October 27, 2015



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2015-16 Election Cycle

Recent Developments in the Law



I. Independent Spending

A. Policy Update

1. Independent Spending by Corporations, Labor Organizations, Foreign Nationals, and Certain Political Committees (*Citizens United*), 80 Fed. Reg. 45116 (July 29, 2015) (Notice of Availability)

- a. Two Petitions for Rulemaking received June 19 and June 22, 2015. Ask Commission to promulgate new rules and revise existing rules concerning:
 - (1) The disclosure of certain financing information regarding independent expenditures and electioneering communications;
 - (2) Election-related spending by foreign nationals;
 - (3) Solicitations of corporate and labor organization employees and members; and
 - (4) Independence of expenditures made by independent-expenditure-only committees and accounts.
- b. Comment deadline is October 27, 2015

UPDATES ON TECHNOLOGY-RELATED DEVELOPMENTS

Technology-Related Developments

Technological Modernization

- ▣ ANPRM possible updates to address electronic transactions, including:
 - Credit and debit cards
 - Internet-based payment processing
 - Text Contributions
 - “Signatures” and “writings,” including electronic redesignations



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Recent Developments in the Law



I. Technology-Related Developments: Technological Modernization

A. Policy Update

1. Technological Modernization, 78 Fed. Reg. 25635 (May 2, 2013) (Advance Notice of Proposed Rulemaking)

- a. ANPRM asks whether the Commission should begin a formal rulemaking to revise its regulations to address contributions and expenditures made by electronic means (such as by credit card, debit card, internet-based payment processing and text messaging); to eliminate or update references to outdated technologies; and to address other technological modernization issues.
- b. The comment period closed on June 3, 2013. Comments received are available at
<http://sers.fec.gov/fosers/viewreg.htm?regno=2013-01>

Technology-Related Developments

S. 366

Sen. Jon Tester (MT)

- ▣ Requires Senate candidates to file with FEC, subject to electronic filing requirements

S. 1910, Financial Services and General Government Appropriations Act of 2016

Sen. John Boozman (AR)

- ▣ Includes Senate electronic filing provision



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Recent Developments in the Law



II. Technology-Related Developments: Electronic Filing

A. Legislative Update

1. **S. 366, *Senate Campaign Disclosure Disparity Act*, Senator Jon Tester (MT)**
 - a. Introduced on February 4, 2015.
 - b. Requires Senate candidates and committees to file designations, statements, and reports with FEC, which would make them subject to electronic filing requirements.
 - c. *Referred to the Committee on Rules & Administration.*
2. **S. 1910, *Financial Services and General Government Appropriations Act of 2016*, Sen. John Boozman (AR)**
 - a. As reported by Senate Appropriations Committee, includes Senate electronic filing provision.

UPDATES ON PACS

PACs: PAC Status

Public Citizen v. FEC / CREW v. FEC

- ▣ Challenges to dismissals of complaints alleging a number of groups should have registered and reported as Super PACs
 - Must the Commission count non-express advocacy ads critical of candidates towards political committee status?
 - Must the Commission analyze spending on a per calendar year basis?



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Recent Developments in the Law



I. PACs: Status

A. Litigation Update

1. *Public Citizen v. FEC*, No. 14-cv-00148 (D.D.C. filed Jan. 31, 2014)

- a. Plaintiffs Public Citizen, Craig Holman, ProtectOurElections.org, and Kevin Zeese challenge the Commission's dismissal of their allegation that Crossroads GPS, an entity organized under Section 501(c)(4) of the Internal Revenue Code, violated FECA by failing to register and report as a political committee.
- b. Plaintiffs contend that the group of Commissioners whose votes prevented the Commission from moving forward with an investigation acted contrary to law.
- c. The case raises a number of issues regarding the determination of political committee status, including whether it was reasonable for the controlling group of Commissioners to decline to count ads that were not express advocacy towards political committee status and whether it was reasonable to examine Crossroads GPS's spending according to the entity's fiscal year rather than by calendar year.
- d. Crossroads GPS has sought to intervene in the case and that request is pending before the D.C. Circuit Court of Appeals, where it was argued on February 17, 2015. The district court proceedings are stayed pending a decision on whether Crossroads GPS is permitted to intervene.

2. ***Citizens for Responsibility and Ethics in Washington v. FEC*, No. 14-cv-01419-CRC (D.D.C. filed Aug. 20, 2014)**
- a. Plaintiffs Citizens for Responsibility and Ethics in Washington (CREW) and its executive director, Melanie Sloan challenge the Commission's dismissal of their administrative complaints alleging that two entities violated FECA by failing to register and report as political committees: American Action Network and Americans for Job Security.
 - b. The case raises the same issues discussed in regard to *Public Citizen*, above.
 - c. CREW also contends that the Commission has issued policies and/or a "de facto regulation" regarding these issues without following the procedural requirements of notice and an opportunity to comment for making regulations. The Commission's motion to dismiss this part of the case was argued on April 20, 2015.

PACs: Unauthorized Committees

Use of Candidate's Name

▣ AO 2015-04 (Collective Actions PAC)

- IEOPC (Super PAC) supporting Bernie Sanders
- Created websites/social media accounts using names such as "Run Bernie Run" and "Believe in Bernie"
- Uses websites/social media accounts to disseminate information about the candidate and to link to candidate's campaign website and donation page



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Recent Developments in the Law



II. PACs: Unauthorized Committees

A. Policy Update

1. AO 2015-04 (Collective Actions PAC)

Commission determined that an unauthorized committee's use of a candidate's name in the unauthorized committee's name, including the titles of its projects. For the purposes of the prohibition, project titles includes online activities.

PACs: Unauthorized Committees

Pursuing America's Greatness v. FEC

- ▣ Challenge to the Commission's interpretation of its regulations in AO 2015-04 (Collective Actions PAC) under the Administrative Procedure Act and First Amendment



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Recent Developments in the Law



B. Litigation Update

1. Pursuing America's Greatness v. FEC, No. 1:15-cv-01217 (D.D.C. filed July 27, 2015)

- a. Pursuing America's Greatness, an independent expenditure-only Super PAC, contends that the Commission's interpretation of its regulations in Advisory Opinion 2015-04 (Collective Actions PAC) is contrary to the Federal Election Campaign Act and violates its First Amendment rights. The entity wishes to operate a website, Facebook page, and Twitter account supporting a candidate and using that candidate's name in the title of each.
- b. Plaintiff has moved for a preliminary injunction.

UPDATES ON PERSONAL USE OF CAMPAIGN FUNDS

Personal Use of Campaign Funds

FEC v. Craig

- ▣ Campaign funds spent for personal legal expenses
- ▣ \$242,535 required to be paid to the US Treasury



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Recent Developments in the Law



I. Personal Use of Campaign Funds

A. Litigation Update

1. ***FEC v. Craig*, 70 F. Supp. 3d 82, (D.D.C. Sept. 30, 2014), appeal docketed, No. 14-5297 (D.C. Cir. Nov. 28, 2014)**
 - a. This case is an FEC enforcement action alleging that former Senator Larry Craig and his campaign committee violated FECA's ban on the personal use of campaign funds, 2 U.S.C. § 439a(b) (now 52 U.S.C. § 30114(b)). The Complaint alleges that defendants spent more than \$200,000 in campaign funds to pay for then-Senator Craig's personal legal expenses resulting from an arrest for disturbing the peace in an airport.
 - b. On September 30, 2014, the United States District Court for the District of Columbia found that the campaign funds at issue were converted to Senator Craig's personal use because the legal bills would have existed irrespective of his duties as an officeholder.
 - c. The court ordered Senator Craig to disgorge \$197,535 and pay a civil penalty of \$45,000 to the United States Treasury.
 - d. Defendant has appealed and oral argument is scheduled for October 7, 2015.

Personal Use of Campaign Funds

FEC v. O'Donnell

- ▣ Use of campaign funds to pay rent and utilities for town house that was candidate's residence and campaign headquarters



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Recent Developments in the Law



2. ***FEC v. O'Donnell, No. 1:15-cv-00017-RGA (D. Del.)***

- a. On January 5, 2015, the Commission filed suit against former Senate candidate Christine O'Donnell, her campaign committee, and her treasurer (in his official capacity as treasurer) for a violation of the prohibition on personal use, 52 U.S.C. § 30114(b).
- b. O'Donnell's campaign committee spent at least \$20,000 to pay for rent and utilities at a townhouse that served as both her residence and campaign headquarters.

UPDATES ON PUBLIC FUNDING

Public Funding

Marked Up

H.R. 412

Rep. Tom Cole (OK-4)

- ☐ Terminates Presidential public funding programs
- ☐ Directs US Treasury to transfer \$88M from Presidential Election Campaign Fund (PECF) to the 10-year Pediatric Research Initiative Fund, with the balance of the PECF to the general treasury



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Recent Developments in the Law



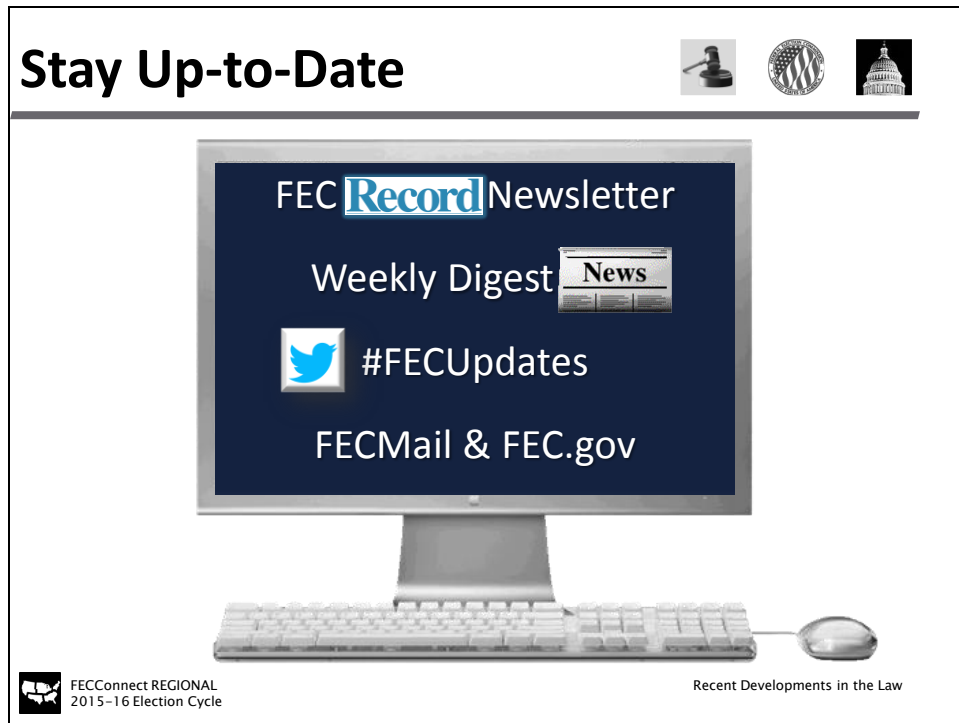
I. Public Funding

A. Legislative Update

1. H.R. 412, Rep. Tom Cole (OK-4)

- a. Marked up by Committee on House Administration on March 4, 2015 and ordered to be reported to House of Representatives.
- b. Terminates the presidential public financing programs.
- c. Directs the U.S. Treasury to transfer \$88 million from the Presidential Election Campaign Fund (PECF) to the 10-Year Pediatric Research Initiative Fund, with the balance of the PECF (approximately \$180 million) to the general treasury.
- d. *Also referred to the Committee on Ways & Means.*

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Workshop Evaluation

Help Us Help You!

Please complete an evaluation
of this workshop.

The screenshot shows a digital evaluation form for the 'Federal Election Commission CHICAGO' workshop held on August 25-26, 2015. The form includes a header with the Chicago skyline and the FECConnect logo. Below the header, it lists the session as 'Recent Developments in the Law' and the speakers as 'Elizabeth G. Goodwin and Kevin D. ...'. The main body of the form contains several sections for feedback: a rating scale for the speakers' knowledge, open text boxes for 'What did you like best about this workshop?' and 'Are there other topics you would like to see covered in future training events?', and a final 'Other Comments' section. At the bottom, there is a footer with the website 'www.fec.gov' and the phone number '1-800-424-9330'.



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Recent Developments in the Law